IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 10103

COPPERWELD STEEL COMPANY, *Plaintiff-Appellant,*

and

BALTIMORE & OHIO RAILROAD COMPANY,
Intervener-Appellant

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees.

MOTION TO AFFIRM

Appellee, the Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the decree of the district court be affirmed.

This is a direct appeal from the final decree, entered on June 24, 1952, by a district court of three judges specially constituted pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing appellants' complaint, which sought to set aside an order made by the Interstate Commerce Commission. Appeal was allowed on August 12, 1952, and appeal papers served on the Attorney General of the United States and on the Interstate Commerce Commission on various dates from August 12 to 21, 1952.

The Commission order approved as valid by the lower court decision was entered in Investigation and Suspension Docket No. 5357, Terminal Allowance, Copperweld Steel Company, Warren, Ohio. The proceeding was instituted upon the filing of tariff schedules by respondent carrier, Baltimore & Ohio Railroad Company, to become effective August 1, 1945, whereby the railroad proposed to pay an allowance of $1.19 per car, with exceptions not here concerned, for terminal switching services to be performed by the industry, within its Warren, Ohio, plant, upon the theory that such service was a part of the obligation to deliver under the line-haul rates, and therefore the duty of the railroad to perform. Operation of the schedule was suspended by the Commission, upon its own initiative, until March 1, 1946, and thereafter by voluntary action of respondent.

The Commission consideration involved the lawfulness of the suspended tariff schedules, with particular reference to the carrier delivery obligation in respect to the Copperweld plant at Warren, Ohio. This necessarily involved determination of questions relating to what was plant service, as distinguished from respondent carrier delivery under its line-haul obligation, and involved the basic decision as to where line-haul transportation begins and ends at said plant, upon the basis of the switching conditions found to exist. Whether or not the tariff proposal to pay an allowance to the Copperweld industry, for performing the switching within its plant, to and from the point where cars were received from and delivered to the railroad, and the points of loading and unloading, was valid and lawful, depended upon whether or not that was a carrier transportation or a plant service. This decision involves application of principles established in Ex Parte No. 104, *Practices of Carriers Affecting Operating Revenues and Expenses, Part II, Terminal Services,* 209 I.C.C. 11, as approved by this Court in a number of cases.[1] Application of these

[1] *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U.S. 402; *United States* v. *Wabash R. Co., et al.*, 321 U.S. 403; *United States* v. *Denver & Rio Grande R. Co., et al.*, 339 U.S. 186; *Hanna Furnace Corp.* v. *United States*, 323 U.S. 667, affirmed *per curiam;* and *Chicago, Burlington & Quincy R., et al.* v. *United States* (Morrell Packing Co.), affirmed *per curiam* 342 U.S. 845.

principles herein is to a proceeding under Section 15 (1) of the Interstate Commerce Act, 49 U.S.C. 15, and not to a supplemental proceeding under Ex Parte No. 104, as in the *Hanna Furnace* and *Morrell* cases below cited. Appellants' Jurisdictional Statement concedes that "propriety and validity of the principles have been repeatedly recognized by the Courts, and are not questioned by plaintiffs."

The Commission here concluded, 283 I.C.C. 327, 336, after extended investigations and two hearings, that the Baltimore & Ohio Railroad, intervener herein in support of Copperweld, which alone served the Warren plant, could not perform the spotting service at its own operating convenience, in a continuous movement without interruption or interference caused by the desires or disabilities of the industry, that such services are in excess of simple switching or team track delivery, that services performed between inbound and outbound interchange tracks in yard 100, on the one hand, and unloading and loading spots on the other, are in excess of those rendered shippers generally in receipt and delivery of traffic on team tracks or industrial sidings or spurs, that such services are plant or industrial services which respondent is not obligated to perform at line-haul rates, and, therefore, that payment of an allowance by respondent to the industry performing the service would be unlawful.

The above conclusions were based upon evidence of record compiled at two hearings, and stated in two reports, the first entered December 1, 1947, 269 I.C.C. 323, the second entered September 28, 1951, above cited. An order was entered along with each report, the first of which was set aside, upon petition of respondent and industry claiming that switching and industrial operations had materially changed since the prior hearing and report, and the proceeding was reopened for further hearing, which was held prior to the second report. For these reasons findings and conclusions in the first report are not here concerned since based upon conditions that were materially changed thereafter. The prior report is here material only as providing a detailed description of track layout in the plant, referred to in the second report, page 329, "to identify certain tracks in connection with the description of the present operations", to avoid unnecessary repetition.

Only the ultimate or required findings in the second report, as based upon changed switching conditions appearing in the record of the further hearing, are here involved, and those findings, pages 336-337, are quoted as follows:

> "We find that the existing line-haul rates of respondent must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the interchange tracks in yard 100 described of record con-

stitute such reasonably convenient points; that the common-carrier transportation which respondent is obligated to perform begins and ends at those interchange tracks; that all services beyond those tracks are in excess of those required in simple switching or team track delivery and are industrial or plant services which it is not the duty of respondent to perform; and that the performance by respondent without reasonably compensatory charges in addition to the line-haul rates of the described services within the plant area beyond the reasonably convenient interchange tracks described, results in the Copperweld Steel Company receiving a preferential service not accorded shippers generally, and results in the refunding or remitting of a portion of the rates and charges collected, in violation of section 6 (7) of the Interstate Commerce Act."

Appellants' Jurisdictional Statement names three claimed errors of the lower court, in its decision sustaining lawfulness of the Commission order involved herein. Error is claimed in the court finding that substantial evidence supports the Commission's findings, that Commission conclusions contrary to those of the Hearing Examiner were proper, and in failing to find under the evidence claimed to show carrier operation at

its own convenience, without direction and control of industry, without interference or interruption by industry, and in a continuous movement, that the order lacked substantial evidence support, its findings were contrary to the evidence, and were arbitrary Four stated grounds are claimed to show invalidity of the Commission order, as based upon alleged findings, (a) that industry locomotives in the plant constituted inherent interruption or interference; (b) that weighing of cars by the railroad on industry scales constitutes interference and interruption under Ex Parte 104 principles, (c) that variable points for delivery of scrap would require industry direction and control, without reference to carrier operating convenience, and in many instances, additional movements, and (d) that frequent and special service in switching ingots are for industry benefit and exceed carrier obligation under its line-haul rates.

The difficulty seems to be that plaintiff has misconceived the established principles relating to terminal switching, and, in attempting to interpret the switching facts at its own plant, has assumed authority to make such fact findings as to what is plant service as distinguished from transportation service, and as to where transportation begins and ends at its plant. This may be accounted for by partisan interest inspired in part by railroad support, such as was extended to the

dispensers of great traffic involved in the many Ex Parte 104 cases decided by this Court. It is the authority of the Commission, not of the industry and carriers concerned, or even of the courts, to make such decisions upon the facts relating to switching conditions at a particular industrial plant. *United States et al.* v. *Wabash R.R., et al.*, 321 U.S. 403, 407-409.

The lower court opinion herein heard and overruled the same contentions here repeated by appellant, as referred to above, with the statement "There is no doubt in our minds that there was substantial evidence upon which to predicate a conclusion that said switching constituted an interruption of a continuous transportation movement." In considering these claims of appellant in connection with the record evidence the opinion states, "The Court could not overlook the glaring incongruity of plaintiffs' position."

That opinion is based upon facts as to switching conditions found to exist at the Copperweld plant by the Commission, as stated in its two reports above cited. These facts, referred to in the court opinion, are that Copperweld operates a steel manufacturing plant, adjacent to B. & O. tracks, within the switching limits of Warren, Ohio, with an elaborate layout of industrial tracks, receiving and switching cars of raw materials in its four plant yards, with four engines, four locomotive cranes, and a number of cars owned and operated

by the industry; that B. & O. delivers and receives cars to and from plant track 100 in yard 100, where upon arrival the plant yardmaster tenders a switch list to the B. & O. conductor, designating points where inbound loads are to be spotted; that inbound scrap iron is first weighed on industry scales in yard 100 and thereafter moved by B. & O. to other tracks and yards, from which they are later moved by industry engines, and other loaded and empty cars are spotted at unloading and loading points, and B. & O. switch outbound cars to track 109 in yard 100 where the outbound train is marshaled, with ingots and produced scrap weighed on track 100; that facts are extremely detailed as to the numerous operations conducted within the plant, as performed by three full B. & O. crews, not only bringing cars up to yard 100, but devoted a substantial part of their time in movements within the plant, the multiplicity of such switching operations averaging from ten to sixteen hours per day for the B. & O.; and that the plant had some 18 miles of tracks with an average total of 50 cars per day received and delivered.

These facts noted by the court opinion are not denied by appellant or its supporting intervener B. & O., or claimed not to be a part of the evidence of record. The lower court deemed those facts sufficient substantial support for the Commission findings upon which its order is based, and clearly they do provide that support. The two

Commission reports give a much wider consideration to facts of record, which afford more substantial support for ultimate conclusions and findings in the second report of September 28, 1951, here directly involved. That report includes much more detailed description of the plant layout, tracks, yards, buildings, and greater detail as to how the plant spotting is actually performed by B. & O. switch crews. During the proceedings and prior to the first report, 269 I.C.C. 323, 325, as there found, actual spotting services within the plant were then performed by B. & O. under contention that the service was a part of its transportation obligation, the precise question herein decided, by the Commission and the Court, to the contrary. Other switching facts noted in the two reports are, that the plant consists of numerous buildings, facilities, and railroad tracks designed as an operating integral and used in the manufacturing operations; that the five tracks of yard 100, through which all traffic enters and leaves the plant, range in length from 1190 to 2200 feet; that in March 1950 a total of 760 inbound cars and 527 outbound, a grand total of 1287, were delivered to and received from the plant, involving weighing, storing, and spotting of movements as described in detail; that inbound shipments consisted largely of scrap iron, 83.3 percent in March 1950, each car of which was weighed loaded and reweighed empty as described, and later switched to yard 300

for unloading up to its capacity, with remaining cars switched to track 500, 110 in yard 100, and track 310 as directed by the plant switch list; and that about 12 cars of ingots per day were moved from a short track, of two-car loading capacity, stemming from track 315C, thus involving multiple movement from that track to other hold tracks, including track 109 in yard 100 where outbound trains are marshaled during the time of plant spotting. The ingot movement to track 109 is not included in facts considered by the lower court or the Commission reports, the evidence of which is the voluminous detailed report of exact car movements, made by Commission agents from actual check, a part of the hearing record (Exhibits 30-33) which was submitted to the lower court.

The Commission based its report conclusions and findings, in part, on evidence of plant disability, particularly as to lack of capacity of yard 300 to receive scrap iron shipments when delivered in yard 100, and the 2-car loading capacity for ingots which necessitated repeated movements to that point, in spotting empty cars, and from there to assemble loaded cars for outbound trains. Evidence of multiple movement of cars within the plant, due to this plant disability, and to the split-up of inbound trains in weighing of scrap and to the assembly cars for outbound trains, provides additional substantial support for the report find-

ings, as has been repeatedly recognized by this Court as the type of evidence sufficient for legal requirements. *United States* v. *American Sheet & Tin Plate Co., et. al.*, 301 U.S. 402; *United States* v. *U.S. Smelting Co., et al.* (*Denver & Rio Grande R. Co., et al.* v. *U.S.*), 339 U.S. 186. The second Commission report, page 335, carefully considered the weighing process at the Copperweld plant and the reasons therefor, concluding that weighing, even though provided for in carrier tariffs break "the continuity of the movement to and from unloading and loading points," that the reweighing of inbound scrap is for industry benefit and constitutes interference and interruption, under principles established in Ex Parte No. 104, 209 I.C.C. 11. Those are the principles consistently and universally approved by this Court, in the many cases decided in accordance with and since *United States* v. *American Sheet & Tin Plate Co.*

The above is deemed sufficient to require all contentions of appellants herein to be overruled. Some of those contentions however deserve further explanation. The first claim of insufficient evidence support for findings, as set forth in the Jurisdictional Statement, (a) relates to an alleged finding that "the presence of industry's locomotives in the plant constituted an inherent interruption or interference prohibiting placement and removal service in a continuous move-

ment." As so stated that is neither a subordinate nor ultimate report finding. Reference is undoubtedly to the general discussion in the second report, page 332, to industry operation in the plant of four engines, four locomotive cranes, and other equipment, some in operation for 24 hours per day, and the tracks over which some of the switching is performed. Appellants claim there is no evidence to show industry engine operations causing interruption or interference, that such a result did occur, and the report did not make any such finding. It is supposed that in the situation here involved, where industry controlled its own engine operations and directed the plant switching of the B. & O. engines, through oral and written instructions issued by its yardmaster, the plant services so closely coordinated under industry control would avoid interference as between the various engines performing the service. Such coordination and direction of carrier switching by industries has been repeatedly held to be evidence of standby railroad engine service in plant spotting one of the principal fact standards, as applied in Ex Parte 104 supplemental proceedings, upon which carrier plant spotting has been condemned by the Commission and Courts. What the report stated herein was not a finding as appellants claim, but rather a general comment, unimportant if not unnecessary to the conclusions and findings made, to the effect that interference

by industry power is inherent where switching is performed by carrier and industry concurrently. And that is legally correct where, as here, the switching of both is coordinated under the direction and control of industry.

The Jurisdictional Statement also contends that it was error to hold that Commission findings and conclusions contrary to those of the Hearing Examiner were proper. This relates only to the weighing of scrap, claimed to be a finding without evidence support, as set forth in contention (b). The question as to weighing has been discussed above. There is a difference in the Commission conclusions and findings from those of the Hearing Examiner, in respect to switching scrap iron, particularly as to weighing. The second report, page 327, in the beginning, notes that conclusions therein differ in part from those recommended by the examiner. This simply means that appellants hopefully rely upon this difference to procure a decision by this Court invalidating the order involved, upon the clearly erroneous theory that a recommended examiner finding is the final legal decision, under application of the Interstate Commerce Act, which cannot be overruled by the Commission. That is untenable and contrary to all previous interpretation and understanding of the purpose of Congress in vesting final administrative authority in the Commission. Approval of such a theory is not to be found in court decisions.

Appellants cite no court opinion which holds that an examiner has final authority, superior to the Commission, to decide cases under the Interstate Commerce Act, unless the reference to *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, is intended as such. The opinion in that case does not include any such holding. It does hold that the examiner decision must be considered in the administrative appeal action, and that is affirmatively shown herein. This the lower court held was "compellingly justified" by the record, under the *Universal Camera Corp.* opinion. The Public Utilities Commission of Ohio joined in the Commission hearings herein, and by its order of October 30, 1951, a part of the record before the Court, prohibited carrier switching within the Copperweld plant, practically as did the Commission order here involved.

The order herein sought to be enjoined and annulled was entered on the same day as the second report, September 25, 1951, and requires the respondent-carrier to cease and desist from performing services, held in the report not to be a part of its transportation obligation under line-haul rates, and to cancel the tariff schedules proposing to pay Copperweld an allowance for performance of the same service, held to be industry service.

Appeal herein presents no new questions, or questions that have been decided differently by the courts. The questions herein have been con-

sistently decided contrary to contentions of appellants in this appeal, and other appeal cases where the lower courts sustained similar Commission orders, as in *John Morrell & Company*, 280 I.C.C. 419, the last such appeal, *Chicago, Burlington & Quincy R.R. Co., et al.* v. *United States, et al., supra*, where a motion to affirm, such as here submitted, was granted.

The only real issue raised by this litigation is whether or not the record as a whole supports the Commission findings and order. The District Court after careful examination of the entire record found (Find. No. 6) that the Commission had before it substantial evidence in support of its findings. The decree should be affirmed.

ALLEN CRENSHAW,
Acting Chief Counsel,
Interstate Commerce Commission.

September, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No.

COPPERWELD STEEL COMPANY and
BALTIMORE & OHIO RAILROAD COMPANY

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Western District of Pennsylvania

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MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION TO AFFIRM OF THE INTERSTATE COMMERCE COMMISSION

This appeal is from a decree of a specially constituted three-judge court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission. The appeal has been docketed and a motion to affirm the decree of the district court, filed by the Interstate Commerce Commis-

sion, is pending. The United States believes that the appeal presents no substantial question warranting a hearing before this Court and that the motion of the Interstate Commerce Commission should accordingly be granted.

The order of the Commission challenged by appellants required the cancellation of tariff provisions whereby appellant Baltimore & Ohio Railroad Company undertook to pay appellant Copperweld Steel Company terminal allowances of $1.19 per car for services performed by the latter company. The order was predicated upon ultimate findings by the Commission to the effect that the line-haul rates did not cover the services in question; that those services were not transportation services, but plant or industry services beyond the common carrier obligation; and that payment of allowances by the railroad to the industry resulted in an unlawful preference. The general legal principles involved have been considered by this Court on numerous occasions since the Commission undertook its general investigation of carriers' practices in respect of terminal services (*Ex parte 104*, 209 I.C.C. 11) some 17 years ago.[1] They were recently summarized in *United States* v. *United States Smelting Co.*, 339 U.S. 186, 189-190, as follows:

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[1] While the instant proceeding is not supplemental to the Commission's *Ex parte 104* proceeding, the principles involved in that case clearly govern here. Appellants fully recognize this in their Statement as to Jurisdiction.

The Commission undertook its general investigation, *Ex parte 104*, in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without "interruption" occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in *Ex parte 104*, such a convenient delivery point marks the beginning and end of what is termed "line-haul" transportation, and is the extent of the service which may be performed under the line-haul rate. The Commission's authority to determine the point where transportation duty ends and industry convenience begins was upheld by this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402. We have repeatedly sustained the Commission in its application of *Ex parte 104* principles to particular plants where it has prohibited the performance of services beyond the point fixed under a line-haul rate. In issuing cease and desist orders in these cases the Commission has acted pursuant to

its duty to enforce § 6(7) of the Interstate Commerce Act, which section prohibits departure from filed tariffs and the rendering of preferential services.

In the instant case, the Commission found that certain designated tracks in Copperweld's yards are suitable for interchange of cars between the B. & O. and the plant; that the nature of the plant layout and the operations performed in Copperweld's yards (including extensive switching activities performed by industry-owned locomotives) are of such character that performance beyond the designated point cannot be accomplished as part of a continuous movement, free from industry interruption and interference; and that the services performed beyond those designated interchange tracks are not the equivalent of simple placement switching, but are specialized plant services performed for the convenience of the industry. Appellants' case comes down to the contention that these findings were arbitrary and capricious and without adequate evidentiary support.

As a reading of the careful opinion of the district court makes plain, the findings and the record have been fully examined by that court. We shall not attempt in this memorandum to recreate the picture of Copperweld's physical layout or to describe the varied and complicated

operations which take place along the 18 miles of industry track encompassed in its yards. We would, however, invite the Court's attention to the striking contrast between the claim of appellants that there was no supporting evidence for the Commission's findings and the conclusions of the three-judge court, reached after an examination of the evidence. Following a discussion of operations which take place in Copperweld's yards, the district court stated:

> There is no doubt in our minds that there was substantial evidence upon which to predicate a conclusion that said switchings constituted an interruption of a continuous transportation movement and necessarily became a terminal operation.
>
> The Court could not overlook the glaring incongruity of plaintiffs' position. The Copperweld yards encompassed 18 miles of track. An average of 25 cars entered, and 25 cars departed from said yards each day.
>
> Despite Copperweld's contention that the movements through its yards were continuous and uninterrupted, we could not ignore the salient fact that the B & O Railroad employed three full crews, who were engaged not only in bringing the cars up to yard 100, but in conjunction with additional personnel of Copperweld, also devoted a substantial part of their

time in facilitating the movements within the Copperweld yards. The multiplicity of switching operations conducted within these yards consumed an average of ten to sixteen hours per day on the part of the crew of the B & O Railroad.

The above-recited facts, without more, indicate the extravagance of appellants' claim that the operations in Copperweld's yards amounted to no more than simple placement switching.

The highly technical question before the Commission—where, at a particular plant, line-haul transportation ends and operation for the industry's convenience begins—is one which the Commission is specially qualified to answer, as this Court has frequently emphasized in cases arising out of the Commission's *Ex parte 104* proceeding. We do not suggest that the administrative record made in such a case should not be carefully scrutinized by the judiciary in order to determine whether the Commission's order has a rational basis. But when such a record has been carefully examined by a district court of three judges and the conclusions of the Commission found to be "compellingly justified" by the evidence, it would scarcely appear that there is any substantial question warranting a further hearing by this Court.[2]

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[2] Since this Court's decision in *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402, approximately 35 orders

For the foregoing reasons, it is respectfully submitted that the motion of the Interstate Commerce Commission to affirm the decree of the distract court should be granted.

ROBERT L. STERN,
Acting Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

RALPH S. SPRITZER,
Special Assistant to the Attorney General.

SEPTEMBER, 1952.

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issued in supplemental *Ex parte* 104 proceedings have been reviewed by the courts. All have been sustained. The most recent order examined by this Court was sustained on motion to affirm in *Chicago, Burlington & Quincy R. Co.* v. *United States*, 342 U.S. 845.

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